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97-1426

IN THE
Supreme Court of the United States
OCTOBER TERM 1997

CRAWFORD & COMPANY, a Corporation,

Petitioner,

v.

KERMITH SONNIER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner (hereinafter referred to as Crawford) is a adjusting and risk management service organization providing loss adjusting and related services to insurance companies and self-insured entities. Respondent (hereinafter referred to as Sonnier) was an employee of Crawford as a catastrophe adjuster from the periods of 1983 through October, 1993. Catastrophe adjusters are used to augment the companies regular work force for man-made and natural disasters.

Sonnier began working for Crawford on the Ashland Oil spill in Pittsburgh in January, 1988. He then worked from March, 1989 through October, 1989 in Alaska on the Exxon Valdez oil spill returning to Pittsburgh to work on the Ashland Oil spill through June, 1991. During that period of time Sonnier never received any overtime wages from Crawford as required under the Fair Labor Standards Act (hereinafter referred to as the F.L.S.A.). Sonnier never had notice of any right to overtime wages as there was no Federal Minimum Wage and Hour Notice (hereinafter referred to as notice or required notice) posted by Crawford in any of its facilities where Sonnier worked or even in any conspicuous place so it could be seen if it hand, in fact, been posted. Crawford provided no evidence to rebut the allegation by Sonnier that it failed to post the required notice. None of Crawford's witnesses substantiated its allegations during the trial in front of the District Court that such notice was posted in any of the work facilities as the Ashland Oil spill or the Exxon Valdez Oil spill or any other work area for that matter.

Sonnier filed this civil action in the U.S. District Court for the Western District of Pennsylvania on October 18, 1994 against Crawford for a claim of unpaid overtime wages due for work he perform for Crawford from 1988 through June 1991, and a count for payment of vacation pay for the period of 1984 through Sonnier's termination of employment with Crawford on September, 1993. A bench trial was held on

September 23 and 24, 1996 before the Honorable District Court Judge Donald J. Lee on the aforementioned claims and ruled in favor of Sonnier with respect to the claim for overtime payment under the F.L.S.A. for work in excess of forty (40) hours per week performed in the periods from 1988 through June, 1991. The Memorandum Opinion by the District Court found that Crawford's failure to properly display the notice required by 29 C.F.R. §516.4 [1] the two year statute of limitations under 29 U.S.C. §255(a) was tolled.

I. THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS REGARDING THE TOLLING OF THE STATUTES OF LIMITATIONS FOR BRINGING CIVIL ACTIONS UNDER 29 U.S.C. §255(a) PURSUANT TO THE F.L.S.A.

Crawford alleges that the District Court's decision to toll the two (2) year statute of limitations pursuant to 29 U.S.C. §255(a) was based solely on Sonnier's allegations that there was no required notices posted at any of the facilities of Crawford and that Sonnier never saw any such notices at any of these facilities. Defendant fails to mention that it failed to prove through the testimony of its own witnesses or through any substantive evidence that it ever posted such required notices in any of it facilities, buildings or home office. Plaintiff Sonnier did not see such required notices because such notices were never posted as required under the F.L.S.A by Crawford. Defendant opines that *Bonham v. Dresser*

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[1] 29 C.F.R. § 500 et. seq. are the regulations by which the requirements of the Fair Labor Standards Act are implemented. This was an issue raised by Crawford in support of its reason for not posting the required notice pursuant to the F.L.S.A. This was one of the factors which proved Crawford's bad faith in failing to comply with the clear language of the F.L.S.A. and the regulations.

Industries, Inc., 569 F.2d 187 (3d Cir. 1978) and *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324 (E.D. Pa. 1984) are not applicable to the present situation in that *Bonham* refers to the tolling of the statute of limitations in an action under the A.D.E.A. (29 U.S.C. §626) and that *Kamens* should not be followed because it was incorrect in equitably tolling the statute of limitations for an action brought under the F.L.S.A.

Crawford instead relies on *Kazanzas v. Walt Disney World Company*, 704 F.2d 1527 (11 Cir. 1983), cert. denied, 464 U.S. 982 (1983) , for the proposition that in that case a terminated employee who filed a law suit under the A.D.E.A. would not be applicable in a situation under 29 U.S.C. §255(a) of the F.L.S.A. This is dicta in its truest sense. *Kazanzas* is a situation dealing with the A.D.E.A. and the present civil action is for relief pursuant to the F.L.S.A. They are different acts with different purposes and different considerations. *Kazanzas* also states that "equitable tolling is read into every statute of limitations of every federal act" which obviously applies to the F.L.S.A. *Kamens* also refers to the United States Supreme Court case of *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946) which permits equitable tolling in all federal regulations.

II. FAILURE TO POST THE MINIMUM WAGE AND HOUR NOTICE EQUITABLY TOLLS THE STATUTE OF LIMITATIONS FOR BRINGING A CIVIL ACTION UNDER THE F.L.S.A.

Crawford relies on *Doe v. Blue Cross*, 112 F. 3d 869, 876 (1997) for the proposition that the two statute of limitations pursuant to 29 U.S.C. §255 (a) is to be applied for the present claim. This fails to answer the issue of equitable tolling which is clearly applicable in all federal statutes. Reliance of *Doe v. Blue Cross* is misplaced. *Doe* involves an

E.R.I.S.A. action not a claim for overtime wages pursuant to the F.L.S.A. Crawford failed to rebut the evidence provided by Sonnier when he showed, through witness testimony at trial, that no required notice was ever posted. Crawford's own witnesses could not even supports its claim that the notices were ever posted at any of its facilities. Crawford's witnesses specifically stated that they did not remember which notices they posted. This is evidence of no required notice being posted. 29 C.F.R. § 516.4 requires that the notice be posted for purposes of the F.L.S.A. as notice of a right to overtime wages for work perform over forty (40) hours per week. Failure to post the required notice under the F.L.S.A. is a definitive reason for the equitable tolling of 29 U.S.C. § 255 (a).

Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990) allows federal courts to extend through equitable relief the statute of limitations for an employee's benefits who is pursuing judicial remedies. Sonnier acted diligently in attempting to pursue his claims under the F.L.S.A. He sought such relief once he was cognizant of the right to sue for overtime payment in the F.L.S.A.. Sonnier clearly testified at trial that he did not know through his prior work experience that there was a right to overtime payment in any job he had ever performed. He stated that it was not until a union meeting that he became aware of such a right to overtime wages for work and at that point in time he diligently pursued his claim. Crawford relied on *Johnson v. Railroad Express Agency*, 421 U.S. 454 (1975) which is not a claim involving the payment of overtime wages pursuant to the F.L.S.A., but a claim under the E.E.O.C. Specifically, *Johnson* allowed the tolling of the statute of limitations to be argued in because it is read into every federal statute. *Id* at 462.

III. THERE WAS NO ABUSE OF DISCRETION BY THE DISTRICT COURT IN TOLLING THE STATUTE OF LIMITATIONS SINCE DEFENDANT FAILED TO POST THE FEDERAL MINIMUM WAGE AND HOUR NOTICE AS REQUIRED BY THE F.L.S.A.

Crawford relies on the *McClinton v. Alabama by-Products Corp.*, 743-F.2d 1483, 1485-86 (11th Cir. 1984) and *McBrayer v. City of Marietta*, 967 F.2d 546, 548 (11th Cir. 1992), in stating that equitable tolling is appropriate but not when a party is ignorant of their specific rights or fail to seek legal advice. *McBrayer* and *McClinton* are cases involving an Equal Employment Occupation Commission (hereinafter referred to as the E.E.O.C.) claim and an Age Discrimination in Employment Act (hereinafter referred to as A.D.E.A.) claim, respectively. Neither case is concerned with overtime wages pursuant to the F.L.S.A. Neither case refers to 29 U.S.C. § 255(a) of the F.L.S.A. *McBrayer* and *McClinton* allow the statute of limitation in those claims to be equitably tolled. Sonnier proved the facts necessary to allow the equitable tolling of the statute of limitations.

Crawford's witnesses did not state that they provided the required notice at any of its facilities. Crawford's allegations that its home office cafeteria had the posting behind a glass case where it could not be removed is merely self-serving evidence. There was no evidence provided that this notice was posted during all periods of time when Sonnier was employed by Crawford. Sonnier's failure to see any notices at any facility or in a cafeteria is due to the fact that such notice was never posted.

REASONS FOR DENYING THE WRIT

The petition's fact bound claim that the courts are in conflict and the trial court abused its discretion in opining that Sonnier proved facts necessary to equitably toll the statute of limitation in 29 U.S.C. § 255(a) does not warrant review by this Court. The decision below was a plainly correct application of settled law, and no conflict among the circuits exists as to the issue of equitable tolling of the statute of limitations (29 U.S.C. § 255(a)) for claims under the F.L.S.A.

Crawford's allegation of a conflict is due to its misapplication of the law and regulations. Crawford attempted to interchange the A.D.E.A. with the F.L.S.A. which are different acts with different purposes. When considering the clear language and intent and the corresponding case law interpreting the Act, it is clear that the Circuit Courts are in agreement as to application of the equitable tolling doctrine pursuant to 29 U.S.C. § 255(a).

Holmberg v. Armbrecht, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946) determined that the equitable tolling of the statute of limitations is applicable to all federal statute of limitations. Clearly this applies to the F.L.S.A. and even the A.D.E.A. The cases of *Johnson v. Railroad Express Agency*, 421 U.S. 454 (1975), *Doe v. Blue Cross*, 112 F.3d 869 (1997), *McBrayer v. City of Marietta*, 967 F.2d 546 (11th Cir. 1992) and *McClinton v. Alabama By-Products Corp.*, 743 F.2d 1483 (11th Cir. 1984) which Crawford relied upon for its argument that the statute of limitations provided for at 29 U.S.C. § 255(a) for the F.L.S.A., are not applicable.

A clear review of these aforementioned cases cited by Crawford did not involve any of the those claimants bringing a civil action for overtime wages under the F.L.S.A. None

of those aforementioned cases involved the application of 29 U.S.C. § 255(a) of the F.L.S.A. Most importantly, all of the cases allowed for the equitable tolling of the statute of limitations to be argued. Equitable tolling is an issue which looks to the facts of each case and is not to be applied in a boilerplate manner as Crawford suggests. Such fact finding was the duty of the trial court.

CONCLUSION

For the reasons set forth above, Sonnier respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April 2, 1998